HONOURABLE SRI JUSTICE

B. SESHASAYANA REDDY

WRIT PETITION NO. 13693 OF 2005

Dated 06-09-2005

Between:

Kosaraju Venkateswara Rao, son of Rama Rao, aged about 37 years, occupation : Business, resident of 54-13-13/A, Bank Colony, 3, Vijayawada-8.

Petitioner.

And:

The Senior Divisional Engineer,(Cood), South Central Railway, Vijayawada, A.P.

Respondent.

ORDER :

This writ petition has been filed by Kosaraju Venkateswararao, with a prayer to issue Writ of Mandamus or any other appropriate Writ or order or direction declaring the letter bearing No.B/W.148/1/6066/WA/Coord, dated 15-06-2005 issued by the Senior Divisional Engineer (Coord), South Central Railway, Vijayawada, A.P.-respondent herein, as arbitrary, illegal and unjust.

(2) The case of the writ petitioner as disclosed in the affidavit filed in support of the writ petition is :

The respondent issued a tender notification for the work of Rayanapadu - Repairs to Underground Sewerage Pipelines, Sewerage Pumps, collection of wells, drainage main outlet for Type I and Type II Quarters (464) Units) at Wagon Workshop Colony. The writ petitioner submitted tender on 23-08-2004. The respondent accepted the

tender by proceedings dated 19-11-2004. The total value of the tender is Rs.16,45,751/-. The work should be competed within three months from the date of issue of letter of acceptance of tender. The petitioner completed the work by the end of March, 2005. The concerned officials made necessary endorsements in the measurement book. The maintenance period is six months, during which period, the petitioner had to maintain the work done by him. Subsequently, the petitioner received a letter dated 15-06-2005 informing him that he was paid more over and above the work done by him to the extent of Rs.20, 59, 798/- and thereby, he was asked to remit the said amount. Hence this writ petition.

3) The respondent filed counter-affidavit. It is stated in the counter-affidavit that the works carried out by the writ petitioner were verified and on verification, he was found to have been paid an excess amount of Rs.20, 59,798, over and above the worth of work done by him. I deem it proper to refer the paragraph 7 of the counter-affidavit and it is thus:

> "In reply to paras 5, 6 and 7 of the affidavit, I submit that the execution of work was done under the direct supervision of Senior Section Engineer/works/Watering Arangements/Rayanapadu and also with monitoring and checking by Assistant Divisional Engineer/Bldgs, South Central Railway, Vijayawada. The measurements for this work were recorded by Sri K. Venkateswara Rao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu in the MB No.530/2004 from Page No.618 to 625 and 641 to 651. The Assistant Divisional Engineer/Bldgs has also furnished test check certification at the relevant pages in the MB. In terms of Clause No.51 (2), it is agreed term of contract that the railway reserves to itself the right to carryout a post-payment audit and or technical examination of the works and the final bill, including all supporting vouchers, abstracts, etc., and to make a claim on the contractor for the refund any excess amount paid to him if as a result of such examination any over-payment to him is discovered to have been made in respect of any works done or alleged to have been done by him under the contract. The check was carried out in similar manner of all the contract works executed in the jurisdiction of Senior Section Engineer/Works/Watering Arrangements/Rayanapadu. The work referred in the present case is one of the works checked in this manner. The measurements have been certified as technically checked by the Chief Draftsman of the Works Branch, Vijayawada. During the check the petitioner was also very much present and other witnesses Sri B. Tomothy, Section Engineer/Works/Rayanapadu were also present. The Special Report on the verification conducted on 01-06-05 and 02-06-05 pertaining to the contract in question is annexed hereto as Annexure-R-V. On verification of the said work, it is found that the Petitioner(Contractor) has been paid an excess

amount of Rs.20,59,798/ over and above the work done by him for the works not actually executed by him. Hence, the respondent (Railways) is entitled to recover the said amount which was gained by the petitioner unlawfully. Further, it is to be submitted that it is not mandatory on the part of Senior Divisional Engineer/Co.ord. South Central Railway, Vijayawada (respondent) to carry out complete check of the measurements or test check of the measurements for the above said contract. It is stipulated that in respect of works contracts costing Rs.25 lakhs and above, a test check of 5% shall be exercised by the Senior Divisional Engineer. In the present case, the value of the work is less than Rs.25 lakhs and therefore does not warrant any check on the part of Senior Divisional Engineer. However, during his normal inspection of the various Railway installations such as Rayanapadu station yard, workshop, etc., the inspection of the open drain work under execution in this contract by the deponent was in progress and the same was inspected. Masonry stones were available at the site and they were found to be of proper quality. The bills have been passed in the Accounts section and thereafter the payment was made to the contractor. Further, it is to be stated that the false measurements have been recorded by Senior Section Enginer/Works/Watering Arrangements/Rayanapadu (Sri K.Venkateswara R a o) . Hence, Sri K. Venkateswararao, Senior Section Engineer/Works/Watering Arrangements/Rayanapadu and Sri P. Satyanarayana, Senior Section Engineer/Drg/Bldgs/Vijayawada have also been kept under suspension w. e. f. 30-05-05 and 01-06-05 respectively."

4) In a nutshell, the plea of the respondent is that the officials of the respondent colluded with the writ petitioner and allowed him to draw the amount over and above to which he is not entitled.

5) Heard the learned counsel appearing for the petitioner and the learned standing counsel appearing for the respondent.

6) The learned counsel for the writ petitioner submits that the alleged inspection of the works done by the writ petitioner was not conducted in his presence, and therefore, any report prepared based on such inspection is in violation of principles of natural justice. He further submits that, as per the general conditions of the contract, amounts were paid on due verification of the work done by the concerned supervising authorities of the railways. He refers clauses 45, 47, 48 and 51 of the General Conditions of Contract which deal with the measurements certificate and payments.

7) He also refers to the special report said to have been prepared by a committee of officers comprising of DEN East/BZA and ADEN Buildings/BZA. He emphasizes the date mentioned in the special report and also the dates mentioned in the notice

impugned in the writ petition. According to the said report, the verification of works is said to have been conducted on 1.6.2005 and 2.6.2005 whereas in the notice impugned in the writ petition, the dates of verification have been mentioned as 03-06-2005, 06-06-2005 and 07-06-2005.

8) The learned counsel appearing on behalf of the respondent raised an objection with regard to the maintainability of the writ petition and the very frame of the writ petition. His principal contention is that the Union of India is a necessary party and therefore, the writ petition is liable to be dismissed on the ground of non-impleadment of the necessary party. He refers to section 79 of the Civil Procedure Code and Article 300 of the Constitution of India. In support of his submissions, reliance has been placed on the decision reported in () "STATE OF KERALA v. G.M., SOUTHERN RAILWAY " wherein it has been held thus:

"According to Section 79 of the Code, in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be (a) in the case of a suit by or against the Central Government, the Union of India, and (b) in the case of a suit by or against a State Government, the State. This section is in accordance with Article 300 of the Constitution, according to which the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State. It is not disputed that Southern Railway is owned by the Union of India. As such, a suit dealing with the alleged liability of that railway should have been brought against the Union of India."

9) Per contra, the learned counsel for the writ petitioner submits that section 79 (a) of the Civil Procedure Code is not applicable to the proceedings. In support of his submission, he refers to section 141 of Civil Procedure Code and rule 7 A of the Writ Rules.

10) It is explicit from section 141 of the Civil Procedure Code that the procedure provided in Civil Procedure code in regard to suits shall be followed as far as it is applicable, to all the proceedings in any Court of Civil jurisdiction.

Explanation to section 141 of Civil Procedure Code reads as follows:

> "In this Section expression "proceedings" includes proceedings under Order IX, but it does not include any proceedings under article 226 of the Constitution."

11) Under Rule 7A of the Writ rules, whenever a petition or application is presented against the Government or any authority, the copies of the petition, the application and the accompanying affidavit and documents shall be served on the Government Pleader or the standing counsel concerned, and the said petition or the application shall not be accepted in the registry unless it contains an endorsement of service signed by the Government pleader or the standing counsel concerned, or by the Secretary of the Government Pleader's office or

by some one authorized by him in this behalf, not below the rank of a Superintendent, or by a Registered clerk of the standing counsel concerned, as the case may be, or by a person so authorized by the standing counsel concerned under intimation to this registry.

12) The grievance of the writ petitioner is against the respondent who issued order impugned in the writ petition and therefore, the objection raised by the respondent that Union of India is necessary party has no merit and the same is liable to be rejected.

13) It is submitted by the learned counsel for the respondent that in view of the arbitration clause in the General Conditions of the agreement, the dispute is required to be resolved by way of arbitration and therefore, the writ petition is not maintainable.

14) It is the grievance of the writ petitioner that he was not put on notice at the time of re-checking of the work done by him. The dates of re-checking mentioned in the report and in the notice impugned in the writ petition, do not tally. As per the contents of the inspection report, the writ petitioner was not present at the time of inspection. Such is the situation, issuing notice impugned in the writ petition basing on the measurements of the work in his presence, clearly amounts to violation of the principles of natural justice. Therefore, I find that the second contention of the learned counsel for the respondent, has no merit.

15) With regard to the merits of the case, I am not inclined to give any finding on the

arguments advanced by either party in view of the order proposed to be passed. Admittedly, the dates of inspection as mentioned in the report and notices impugned in the writ petition do not tally each other. The respondent has stated in para 5 of the counter affidavit is as follows:

> "The report of the Investigation committee prepared on 06-06-05 which was also communicated to the writ petitioner along with impugned letter dated 15-06-2005 clearly shows the various discrepancies as detailed in Schedule-A. Schedule-A1, Schedule-A2 and Schedule-B of the report, in arriving at the total amount of Rs.20,59,798-02ps which is to be recovered from the Writ petitioner. The report of the Investigation committee containing the schedules are annexed as material papers.
>
> However, if the Hon'ble Court comes to the conclusion that there is denial of the opportunity to the Writ petitioner at the time of the verification/investigation by the said committee, the Railways are prepared to offer the writ petitioner an opportunity for re-verification of the discrepancies that were found by the investigation committee resulting in the impugned letter."

16) As the verification by a committee of officers is not made in the presence of the writ petitioner, I deem it appropriate to set aside the notice impugned in the writ petition giving liberty to the respondent to conduct verification of the work done by the writ petitioner in his presence, within two months.

17) Accordingly, the writ petition is allowed. No order as to costs.

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Justice B. SESHASAYANA REDDY

Date : 06-09-2005

Note:

CC by one week.

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Dvs

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